

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 96-0662

**Sales and Withholding Tax
For Years 1994, 1995, and 1996**

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Responsible Officer Liability – Duty to Remit Sales and Withholding Taxes

Authority: Ind. Code § 6-3-4-8;
Ind. Code § 6-8.1-5-1;
Indiana Department of State Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

The taxpayer protests the assessment of sales and withholding tax liability as a responsible officer.

II. Tax Administration – Penalty

Authority: Ind. Code § 6-8.1-10-2.1

The taxpayer protests the 10% penalty assessed.

STATEMENT OF FACTS

The taxpayer was President/Director of three Indiana companies that managed and/or owned three restaurants in Indiana from August 13, 1995 to approximately October 1, 1996, when the companies became defunct. Prior to August 13, 1995, the taxpayer was a shareholder in the companies. The Department of Revenue assessed sales and withholding taxes against the taxpayer as a responsible officer for periods before and after August 13, 1995. A ten percent (10%) negligence penalty was also assessed.

The taxpayer failed to appear at the administrative hearing on these matters. This Letter of Findings is based on the taxpayer's protest letter and other information contained in the Department of Revenue file.

I. Responsible Officer Liability – Duty to Remit Sales and Withholding Taxes**DISCUSSION**

The taxpayer argues that he is not liable as a responsible officer for the sales and withholding taxes, that were not submitted to the Department, from the companies he was President/Director of for the years 1994-1996. The taxpayer further maintains that he did not write checks or file tax returns during the time he was President/Director of the companies. “The notice of proposed assessment is *prima facie* evidence that the department’s claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.” Ind. Code § 6-8.1-5-1(b). The taxpayer has failed to present any evidence to show that someone, beside himself, was responsible for the payment of the sales and withholding taxes for the companies.

Ind. Code § 6-3-4-8(f) states in relevant part:

All money deducted and withheld by an employer shall immediately upon such deduction be the money of the state, and every employer who deducts and retains any amount of money under the provisions of IC 6-3 shall hold the same in trust for the state of Indiana and for payment thereof to the department in the manner and at the times provided in IC 6-3.

Additionally, Ind. Code § 6-3-4-8(g) states in part:

In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.

In determining who is a responsible officer, the same standards are applied under both the gross retail (sales) tax and the withholding tax. Indiana Department of State Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind. 1995). The Court in Safayan identified three factors to consider when determining liability as a responsible officer: 1.) the person’s position within the structure of the corporation; 2.) the authority of the person as established by the articles of incorporation, bylaws, or the person’s employment contract; and 3.) whether the person actually exercised control over the corporation’s finances by, for example, signing tax returns. Id. In the instant case, the taxpayer admits in his protest letter and in his Affidavit of Corporate Responsibility that he was President/Director of the companies from August 13, 1995 until the companies became defunct in 1996. The file also contains a copy of an S Corporation Return, dated October 31, 1995, that the taxpayer signed as President. The taxpayer is a responsible officer as defined by the Court in Safayan and is, therefore, personally liable for the payment of the sales and withholding taxes during the time period he was President/Director. The taxpayer has shown, however, that he was not a responsible officer before August 13, 1995, and is not liable for sales and withholding tax owed by the companies prior to that date.

FINDING

The taxpayer's protest is denied in part and sustained in part.

II. Tax Administration – Penalty

DISCUSSION

The taxpayer protests the assessment of a ten percent (10%) negligence penalty for his failure to remit sales and withholding taxes for the companies while he was President/Director. In his protest letter, the taxpayer states that the management of the companies have always made it a priority to pay all sales and withholding taxes. In Indiana, if a person "fails to timely remit any tax held in trust for the state," that person is subject to a ten percent (10%) penalty. Ind. Code § 6-8.1-10-2.1(a). A taxpayer may avoid a penalty by making an affirmative showing in a verified written statement that there was reasonable cause for failure to pay the tax. Ind. Code § 6-8.1-10-2.1(e). The taxpayer has not provided the Department with reasonable cause for his failure to pay the tax deficiencies. The penalty in this case is proper.

FINDING

The taxpayer's protest is denied.